In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1063

DIANA KEARNY POWELL, PETITIONER

v.

NICHOLAS KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, HENRY H. PAIGE AND JOHN E. POWELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT NICHOLAS KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, IN OPPOSITION

Petitioner seeks review of two completely separate cases decided by the Court of Appeals for the District of Columbia Circuit, in only one of which—*Powell* v. *Katzenbach*, No. 19,285 below (Pet. App. 1a–2a)—the government was involved. In that case, petitioner had filed a complaint seeking the issuance of a writ of mandamus to compel the Attorney General to institute criminal proceedings against a national bank, the bank's attorney, another person, and

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two judges (Pet. App. 1a). She alleged that the bank, its attorney and the other individual had embezzled and converted property (in violation of 18 U.S.C. 645, 656 and 1005) for the purpose of defeating petitioner's remainderman interest under her grandmother's will, and that in litigation concerning the will[1] a judge of the district court and a judge of the court of appeals had knowingly and deliberately misstated the facts and law in aid of the allegedly criminal conduct of the bank and others. The district court dismissed the complaint for failure to state a cause of action, and the court of appeals affirmed (Pet. App. 1a–2a).

The bringing of federal criminal prosecutions is a matter within the discretion of the Attorney General or other government authorities;[2] hence, no action in the nature of mandamus may be maintained to compel the institution of criminal proceedings.[3] In light of these settled principles, it is clear that the courts below were wholly correct in holding that petitioner's

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[1] *Powell* v. *National Savings and Trust Company*, 296 F. 2d 412 (C.A.D.C.), certiorari denied, 368 U.S. 946.

[2] *The Confiscation Cases*, 7 Wall. 454, 457; *United States* v. *Thompson*, 251 U.S. 407, 412–413; *Deutsch* v. *Aderhold*, 80 F. 2d 677, 678 (C.A. 5); *District of Columbia* v. *Buckley*, 128 F. 2d 17, 20 (C.A.D.C.), certiorari denied, 317 U.S. 658; *Clemons* v. *United States*, 137 F. 2d 302, 305 (C.A. 4).

[3] *Goldberg* v. *Hoffman*, 225 F. 2d 463 (C.A. 7); *Milliken* v. *Stone*, 7 F. 2d 397 (S.D.N.Y.), affirmed, 16 F. 2d 981 (C.A. 2), certiorari denied, 274 U.S. 748; *Moses* v. *Kennedy*, 219 F. Supp. 762 (D.D.C.), affirmed, 342 F. 2d 931 (C.A.D.C.); *Pugach* v. *Klein*, 193 F. Supp. 630 (S.D.N.Y.).

complaint against the Attorney General failed to state a cause of action, and that further review is not warranted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MARCH 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

PETITION FOR REHEARING

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FILED
MAY 11 1966
JOHN F. DAVIS, CLERK

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Respondents,

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIANA KEARNY POWELL

1500 Massachusetts Ave., N.W.
Washington, D. C. 20005

Petitioner pro se

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PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays for rehearing on intervening circumstances and grounds not previously presented under Rule 58(2) of this Court of the Petition for Writ of

Certiorari to the United States Court of Appeals for the District of Columbia Circuit denied by this Court on April 18, 1966.

ADDITIONAL CONSTITUTIONAL AMENDMENT, STATUTE INVOLVED

Constitution of the United States, Amendment 1, in part:

Congress shall make no law . . . or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

18 U.S.C. 371:

If two or more persons conspire . . . to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be . . .

ADDITIONAL QUESTIONS PRESENTED

1. Whether the matters complained of by petitioner constitute a conspiracy to defraud the United States under 18 U.S.C. 371.

2. Whether arbitrary rejection of petitioner's Complaint deprives her of the effective right of petition, guaranteed by Amendment 1 of the Constitution of the United States.

INTERVENING CIRCUMSTANCES AND GROUNDS NOT PREVIOUSLY PRESENTED

I.

NEW DECISIONS HAVE BEEN RENDERED IN RELATED CASES RELEVANT TO PETITIONER'S COMPLAINT.

The following cases, decided since the filing of Petition sought to be reviewed are relevant to the instant case and should be considered together with it:

1. *Powell v. National Savings and Trust Company*, No. 1154 in this Court, now pending upon petition for writ of certiorari, challenges the authority by which the respondent therein presented claims in conflict with its former trusteeship.

2. *In the Matter of Diana Kearny Powell*, Miscellaneous No. 54-65 in the United States District Court for the District of Columbia, now being appealed, charging respondent (the petitioner herein) with professional misconduct in filing the instant case of *Powell v. Katzenbach.*

II.

NEW OVERT ACTS HAVE BEEN COMMITTED EVIDENTIARY OF CONSPIRACY TO DEFRAUD THE GOVERNMENT.

Additional overt acts in furtherance of the alleged conspiracy to defraud by the persons complained of have strengthened petitioner's position.

Henry H. Paige, in claiming $5,000 for his firm for services, on April 27, 1966, in *Lucy Powell v. Diana Kearny Powell et al*, C.A. 4051-55 in the District Court, concealed the fact that this case is now pending on petition for writ of ceritorari in this Court as *Powell v. National Savings and Trust Company*, No. 1154 *supra*. He further deceived the Court below by misrepresenting that the original complaint was a petition by the National Savings and Trust Company as Successor Trustee for construction of the will involved, whereas the original Complaint in fact was brought under the will by the plaintiff therein, now deceased, for appointment of the successor trustee. Benjamin Dulany was present, aiding and abetting, although silent.

Judge Holtzoff, testifying as a witness on January 18, 1966, in Miscellaneous 54-65, *In the Matter of Diana Kearny Powell*, in the United States District Court for the District of Columbia, gave the following perjured testimony, in reference to the original Complaint filed in the instant case, *Powell v. Katzenbach*, notwithstanding the record substantiated the allegations of the Complaint:

> "... I will make this comment, however: That the statements made by the respondent in her complaint are absolutely false.
>
> "Well, I will make the same comment: That the entire paragraph is a statement of falsehoods except the statement that I rendered an oral decision in that action." (Tr. 10-11)

III.

THE DEPARTMENT OF JUSTICE HAS RECENTLY REAFFIRMED ITS POSITION THAT DECEPTION OF THE COURT IS WITHIN THE PROVISIONS OF 18 U.S.C. 371.

As recently as the week following denial of certiorari in the instant case, it came to petitioner's attention that the Department of Justice has taken the position that acts similar to those complained of constituted a conspiracy to defraud the United States in violation of 18 U.S.C. 371 in *Raymond Dennis et al., Petitioners v. United States of America*, No. 502 in this Court. Among the numerous authorities cited in the Government's brief, particularly pertinent are:

United States v. Manton, 107 F.2d 834 (C.A. 2) certiorari denied 309 U.S. 664, involving a United States judge and excluding bribery as a necessary element of the offense of conspiracy;

Hammerschmidt v. United States, 265 U.S. 182, 188, authority that the conspiracy provision includes not only cheating the Government of property or money, but also defeating the lawful functions of government by misrepresentation, chicane or trickery.

IV.

PETITIONER HAS BEEN DEPRIVED OF EFFECTIVE EXERCISE OF HER RIGHT TO PETITION FOR REDRESS OF GRIEVANCES GUARANTEED BY AMENDMENT 1 OF THE CONSTITUTION

Petitioner further raises the question that arbitrary and capricious refusal to consider her complaints, each of which is supported by substantial undisputed facts of record and by well-settled case law, violates Amendment 1 of the Constitution of the United States by depriving her of the effective exercise of her right to petition the Government for a redress of grievances guaranteed therein.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that Petition for Writ of Certiorari be granted.

DIANA KEARNY POWELL

1500 Massachusetts Ave., N.W.
Washington, D. C. 20005

Petitioner pro se

/

CERTIFICATE OF GOOD FAITH

I, Diana Kearny Powell, the Petitioner herein and a member of the Bar of the Supreme Court of the United States, hereby certify that the foregoing Petition for Rehearing of Petition for Writ of Certiorari is presented in good faith and not for delay, and that it is restricted to intervening circumstances of substantial effect, or which to the extent that they were available to petitioner, were not previously presented.

Diana Kearny Powell
Petitioner pro se

CERTIFICATE OF SERVICE

I, Diana Kearny Powell, a member of the Bar of the Supreme Court of the United States, hereby certify that service of the foregoing Petition for Rehearing was made upon respondents by delivery of five copies thereof on the 12th day of May, 1966, at the office of the attorneys of record as follows:

Thurgood Marshall, Solicitor General
Department of Justice
Washington, D. C. 20530
for the Hon. Nicholas Katzenbach,
Attorney General

Albert E. Brault, Esq.
1314 - 19th Street, N. W.
Washington, D. C. 20036
for Henry H. Paige and
John E. Powell

Diana Kearny Powell